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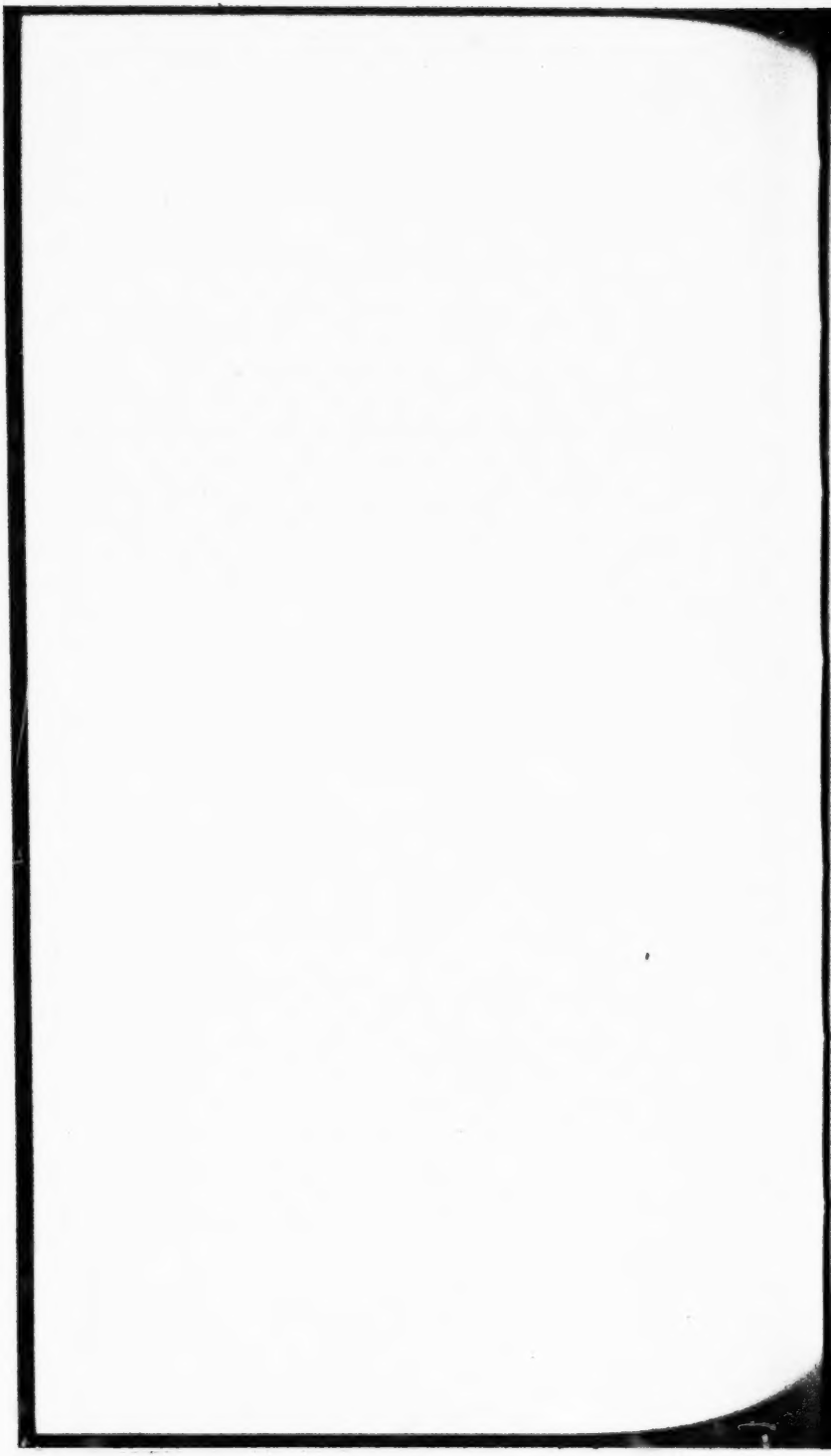

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 2032 MISC.

IN THE MATTER OF
THE APPLICATION OF TIMOTHY CONNORS
FOR A WRIT OF HABEAS CORPUS

TIMOTHY CONNORS,

Petitioner,

vs.

STATE OF SOUTH DAKOTA and
DON R. ERICKSON, Warden,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondents pray that the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered on February 19, 1970, be in all respects denied.

OPINIONS BELOW

The opinions below in the United States Court of Appeals, Eighth Circuit; the United States District Court for the District of South Dakota, Southern Division; and the South Dakota Supreme Court are cited in the Petition and the Federal opinions are appended to the Petition, as Appendix "A" and Appendix "B".

JURISDICTION

Rule 19 of the Supreme Court Rules states that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." As a matter of discretion, the United States Supreme Court should deny the Petition for Certiorari in the instant case for at least the following reasons:

(1) The question decided by the United States Court of Appeals, Eighth Circuit, in favor of the State of South Dakota has heretofor been determined by the United States

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Supreme Court, in a decision which also favors the position of the State of South Dakota. (*Frazier v. Cupp*, 394 US 731, 22 L Ed 2d 684, 89 S. Ct. 1420)

(2) The various Courts of Appeals of the United States are not in conflict insofar as the precise question and factual circumstances presented by the instant case are concerned and any possible conflict that prevailed heretofor has now been resolved by the decision in *Frazier v. Cupp*, supra.

STATEMENT OF THE CASE

Petitioner was tried before a jury in the Second Judicial Circuit Court in and for Minnehaha County, South Dakota, on the charge of First Degree Robbery in reference to the armed robbery of a Red Owl store in Sioux Falls, South Dakota, on July 13, 1961. The jury trial, concluded on September 30, 1965, resulted in a verdict of guilty against the Petitioner, and he was sentenced to a term of 10 years in the State Penitentiary. On direct appeal to the South Dakota Supreme Court, that Court decided

that Petitioner had a fair trial, there was no reversible error and affirmed the conviction of the trial court. *State v. Connors*, (1967) 82 S.D. 489, 149 N.W. 2d 65.

In an unreported decision dated April 2, 1969, the United States District Court, District of South Dakota, Southern Division, determined that the Petitioner was denied the due process of the law, specifically his right to counsel and the right to remain silent, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as the result of the failure to adequately provide counsel for Petitioner during the interrogatory process while Petitioner was being held under the charge of attempted robbery of another store in Minneapolis shortly after the South Dakota robbery.[1] This interrogation occurred on sepa-

1. Petitioner was convicted of attempted robbery in Minnesota and served the sentence imposed. On May 21, 1965, he waived extradition and was returned to South Dakota to stand trial for the Sioux Falls robbery.

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rate occasions in July and August of 1961, and Petitioner was interrogated, separately, by a detective of the Minneapolis Police Department in reference to the Minneapolis crime, and a few days later by a detective of the Sioux Falls Police Department in reference to the Sioux Falls crime.

The decision of the United States Court of Appeals, Eighth Circuit, dated February 19, 1970, unreported as of this date, reversed the decision of the United States District Court and remanded the case with directions to deny the Writ of Habeas Corpus and dismiss the petition.

Petitioner now seeks to have his case reviewed by the United States Supreme Court by application for a Writ of Certiorari, and presents to this Court the sole question, whether Petitioner was deprived of the assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States. We believe that a review of this case must also con-

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sider the provision of the Fifth Amendment of the Constitution of the United States which states that, "No person . . . shall be *compelled*, in any criminal case, to be a witness against himself . . ."

ARGUMENT

At the trial of Petitioner in South Dakota which commenced on September 28, 1965, Lieutenant Knott, a detective of the Sioux Falls Police Department, testified in reference to statements made to him by Petitioner during a brief interrogation at the Minneapolis Police Department in August, 1961. It is significant that we focus on the total circumstances surrounding the petitioner when he made these statements to the Sioux Falls detective, who later testified at the trial in South Dakota in reference to these statements of Petitioner. Prior to interrogation by Lt. Knott, Petitioner had been interrogated by a Minneapolis detective, who advised Petitioner of his constitutional rights, in-

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cluding his right to have an attorney and his right to remain silent. Petitioner made the passing remark that he would make no statement until he conferred with an attorney. Thereafter, interrogation by the Minneapolis police was discontinued, no further statements were elicited by them, Petitioner made no further effort, according to the record in this case, to seek legal assistance and counsel, and no effort by anyone was thereafter exercised to *compel* the Petitioner to make any statements.

Lt. Knott testified at the trial that prior to receiving the statement from Petitioner he attempted to advise him of certain rights, but after warning him that he need not make a statement at that time, Petitioner interrupted him and stated that he already knew his rights. The conversation between Lt. Knott and Petitioner continued for approximately 30 minutes and Petitioner made certain statements which Lt. Knott testified to at the trial some four years later.

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At the trial, defense counsel made no effort to suppress these alleged incriminating statements nor was any objection interposed to the testimony of Lt. Knott.

We read in the Transcript of the Habeas Corpus hearing in the United States District Court, beginning at page 27, that the conversation between Lt. Knott and Petitioner took place in an interrogation room in the Minneapolis Police Department. Petitioner was allowed to be seated, he was allowed to smoke if he desired, the room was ventilated and there were no bright or offensive lights brought into play, Petitioner was not deprived of sleep, food or water, and the interrogation apparently lasted less than a half an hour. Petitioner was not threatened in any way nor was he promised anything in return for making any statement. This record makes clear that there was no coercion, mentally or physically, abusive practices, trickery, brutality or unfair prac-

tices, imposed upon Petitioner. It is equally clear that Petitioner was not compelled in any way to make any statements to the Sioux Falls detective, on the contrary the record demonstrates that the statements made by Petitioner were voluntary and under the condition that Petitioner knew and understood his rights.

Under these circumstances, the decision of the United States Court of Appeals, Eighth Circuit (February 19, 1970) correctly determined that:

> It was conceded by appellee's counsel, both before this court and the district court, that the voluntariness of the statements made by appellee to Knott was not in issue. Indeed, in view of the circumstances of this case appellee could hardly take a different position. Appellee was mature and of normal intelligence. There is evidence that shortly before the interrogation he was advised of his right to remain silent and to counsel, and at the interrogation by Lieutenant Knott he stated that he knew his rights. The interrogation itself was of short duration (approximately 30 minutes) and conducted under reasonable conditions. Appellee admitted that there was no

> effort made to coerce him, either physically or mentally, into making statements which were elicited. And the interrogating officer employed no falsehoods in inducing the statements. Certainly, under the presently applicable standard, appellee's statements were voluntary. See, e.g., Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U. S. 737 (1966).

Petitioner seems to rely exclusively on, and attempts to persuade this Court that the decision below directly conflicts with the decision in *Escobedo v. Illinois*, 378 U.S. 478, 12 L Ed 2d 977, 84 S. Ct. 1758 (1964).

The South Dakota Supreme Court in its decision in *State v. Connors*, supra, recognized at the time, that decisions of various courts interpreting *Escobedo* are divided, but concluded:

> Considered in the light of its facts that decision does not hold that failure alone to advise a suspect of his right to remain silent and right to counsel is sufficient ground for reversal. United States v. Robinson, 2 Cir., 354 F. 2d 109; United States v. Cone, 2 Cir., 354 F. 2d 119; Peo-

> ple v. Gunner, 15 N.Y. 2d 226, 205 N. E. 2d 852; People v. McQueen, 18 N. Y. 2d 337, 274 N.Y.S. 2d, 221 N.E. 2d 550; Browne v. State, 24 Wis. 2d 491, 129 N.W. 2d 175, 131 N.W. 2d 169; Reimers v. State, 31 Wis. 2d 457, 143 N.W. 2d 525; State v. Beasley, Mo. 404 S.W. 2d 689; contra: Russo v. New Jersey, 3 Cir., 351 F 2d 429; People v. Dorado, 40 Cal. Reptr. 264; 394 P 2d 952; State v. Neely, 239 Or. 487, 395 P 2d 557, 398 P 2d 482. *Appellant made no request to consult with an attorney or anyone else nor did an attorney seek to confer with him as occurred in Escobedo.* (Emphasis added)

The United States Court of Appeals, Eighth Circuit, also recognized the division of the various courts of this land in interpreting the ruling of the United States Supreme Court in *Escobedo*, saying:

> Acknowledgment of Escobedo's authoritative weight and application of its teachings are two different matters, as illustrated by the diversity of readings the decision has incurred.

In concluding that the Sixth Amendment rights of Petitioner were not violated, the Eighth Circuit found the facts and decision in

the instant case are consistent with the recent ruling and interpretation of *Escobedo* by the United States Supreme Court in *Frazier v. Cupp*, 394 U.S. 731 (1969), supra, which decision again reviewed the requirements of *Escobedo:*

> We do not believe that Escobedo covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in Escobedo were unmistakably informed of their suspect's wishes; (not so in the case of Timothy Connors who never did advise Lt. Knott that he wished the services of a lawyer before making a statement) in fact Escobedo's attorney was present and repeatedly requested permission to see his client. (No attorney attempted to see and advise Timothy Connors) Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. (In fact, Timothy Connors never did ask Lt. Knott to cease the interrogation and provide him with legal counsel) Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in Escobedo. 394 U.S. 739.

Absent the particular and "totality of"

circumstances which obtained in *Escobedo*, the decision therein cannot be applied to cases such as *Frazier* and the instant case. The *Escobedo* decision clearly tells us that *under the particular circumstances obtaining*, the police investigation having been one focused on the accused as a suspect, rather than a general investigation, the refusal to honor the accused's request to consult with his attorney constituted a denial of his right to assistance of counsel under the Sixth and Fourteenth Amendments. The ruling in *Escobedo* definitely is limited and restricted to the particular circumstances that surrounded Danny Escobedo in the Chicago Police Department, and similar unfair and unconstitutional practices of police officials in similar situations.

The United States Supreme Court having ruled in the *Frazier* case where the circumstances are nearly identical to Timothy Connors' situation, there is no reason or need for this Court

to again consider the same question by reviewing the instant case on Writ of Certiorari.

Petitioner insists in his application for the Writ of Certiorari that the position of the Ninth Circuit of the United States Court of Appeals is in direct conflict with the decision of the Eighth Circuit. This contention of Petitioner is refuted by the decision in *Frazier* in which the United States Supreme Court affirmed the position and decision of the Ninth Circuit in the case of *Gladden v. Frazier*, 388 F. 2d 777.

The voluntariness of the statement or confession of the accused has been and still is paramount and decisive in determining whether or not the constitutional rights of the accused were violated by interrogation by the police, except that the *Miranda* warnings must be given, now, before any interrogation by police commences with the view of eliciting incriminating statements from the accused. Of course, *Miranda* is not ap

plicable in the instant case, nor does petitioner so contend, for the reason that the decision in *Miranda* v. *Arizona*, 384 U.S. 436, came after the trial in the instant case, and is not retroactive. The decision in *Jackson v. Denno*, 378 US 368, 12 L Ed 2d 908, 84 S. Ct. 1774 (1964) was given contemporaneously with the decision in *Escobedo* and determines the admissibility of the statement of the accused if voluntarily made under conditions in which no coercive force or methods were practiced by the police interrogators. The annotation at 22 L Ed 2d 872, 876, Admissibility of Confessions, recognizes and supports by a citation of cases that it is recognized expressly or by implication that the voluntariness of a defendant's pretrial confession was the determinative factor in the confession's admissibility in evidence against that Defendant in a criminal prosecution.

In the instant case we find none of the criteria in the record to support or give recog-

nition to any contention that the statements of Timothy Connors were involuntarily made, such as subjecting Connors to violence or threats of violence, direct or indirect promises, threats or coercion, lengthy interrogation under intense conditions, physical deprivations, such as lack of food, water, or sleep, refusal to allow counsel to talk with his client or direct refusal of request by defendant to consult with an attorney positively stated to the interrogators, or any other form of deception or trickery practiced upon defendant by the police.

The bald assertion of Petitioner that *Escobedo* is controlling and decisive of his case, without any further showing that the circumstances which prevailed in Escobedo were repeated in reference to Connors, surely must tax the imagination of this Court and is an attempt to stretch the limitations of *Escobedo* beyond any reasonable and intended necessity or standard. Petitioner urges that the decision of the Fourth Circuit in

Miller v. Warden of the Maryland Penitentiary, 338 F. 2d 201, is in direct conflict with the decision of the Eighth Circuit in the instant case.

In the *Miller* case it is apparent that the Fourth Circuit based its position and placed reliance on *Escobedo*, for the reason that the record disclosed that before and during the police interrogation there was a denial by the police of continual, insistent requests by the defendant to call his attorney and family. For the reasons that we do not have a similar situation to *Miller* in this case and the fact that this was the position of the Fourth Circuit in 1964, and that Court has not as yet been called upon to decide a case involving the *Frazier* situation and circumstances, we fail to see or comprehend any direct conflict between the position of the Fourth and Eighth Circuits.

In *Gladden v. Frazier*, 388 F. 2d, supra, at page 782 the Ninth Circuit wrote these words

which should be carefully considered by the other circuits:

> It is not for this court, or for any federal court inferior to the Supreme Court of the United States, to expand the Supreme Court's carefully defined ruling in Escobedo. The district court's conclusion that Frazier's statement had been unconstitutionally obtained was erroneous.

CONCLUSION

In deference to the decision of the United States District Court in the Connors habeas corpus, the Eighth Circuit noted in its February 19, 1970, decision that *Frazier* was decided after the district court filed its memorandum opinion. We feel that the decision of the United States District Court could well have been different, had that Court had the benefit of the rule in *Frazier* which distinguished *Escobedo* as to the "totality of circumstances."

In deciding as it did, the *Frazier* case persuaded the Ninth Circuit to carefully limit the *Escobedo* rule; the *Frazier* decision has caused

the Eighth Circuit to carefully limit the *Escobedo* rule, which course it did follow in the instant case; and *Frazier* should now cause all of the lower Federal courts to carefully apply to future cases the limited rule in *Escobedo*.

We urge the rejection of the application of Petitioner for a Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

WALTER W. ANDRE, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 12th day of May 1970, I served copies of the foregoing Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, upon Timothy J. Nimick, Attorney for Petitioner at his address: 310 South First Avenue, Sioux Falls, South Dakota, by mailing copies of said Respondent's Brief duly addressed to him with the proper postage prepaid.

Walter W. Andre

WALTER W. ANDRE, one of the Attorneys for Respondent